



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE

# AMERICAN LAW REGISTER.

---

FEBRUARY, 1872.

---

## ACTIONS FOR BREACH OF PROMISE OF MARRIAGE.

FEW questions have been presented to our courts of judicature that have elicited more social discussion, or attracted more general attention of the outside world, than the one we propose briefly to consider.

“Marriage,” observes Lord ROBERTSON, the distinguished Scotch judge, “is a contract *sui generis*, and differing, in some respects, from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are to a certain extent matters of municipal regulation, over which the parties have no control by any declaration of their will; it confers the *status* of legitimacy on children born in wedlock with all the consequential rights, duties, and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force, even although one of the parties should be for ever rendered incap-

ble, as in the case of incurable insanity, or the like, from performing his part of the mutual contract. No wonder that the rights, duties, and obligations arising from so important a contract, should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country :" *Duntze v. Levett*, Ferg. 385, 397.

The distinction between marriage and ordinary contracts thus forcibly pointed out, is approvingly quoted by Judge STORY, in his *Confl. Laws*, §§ 109-111, and has often been considered an eloquent exposition of the subject discussed.

Another Scotch judge, of no little renown, has observed, " Though the origin of marriage is contract, it is in a different situation from all others :" 3 Eng. Ec. 505; *Duntze v. Levett*, Ferg. 401; *Gordon v. Pye*, Ferg. 276, 339.

In the case of *Maguire v. Maguire*, 7 Dana 181, ROBERTSON, C. J., of Kentucky, observes: " Marriage, though in one sense a contract—because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds—is, nevertheless, *sui generis*, and unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations."

And in Rogers's Ec. Law, 2d ed., 595, it is said, " Marriage is a contract; having its origin in the law of nature antecedent to all civil institutions, but adopted by political society, and charged thereby with various civil obligations. It is founded on mutual consent, which is the essence of all contracts; and is entered into by two persons of different sexes, with a view to their mutual comfort and support, and for the procreation of children." We have thus given the *status* and the responsibilities arising from the marriage contract to aid us in discussing the peculiar circumstances growing out of alliances of friendship and of affection. The written law of almost every state and nation has provided, in some mode or other, the means of granting redress and compensation, in way of damages, for a breach of the marriage contract as well as the breach of promise to marry.

We shall endeavor, in the space allotted to us, to consider the rules of law governing such contracts, and to notice some pecu-

iliar cases of breach of promise of marriage in the books and out of them.

Upon reading and examining the various cases of breach of promise to marry, and the motives which prompted the action of the parties, one is forcibly reminded what the sapient and quaint Hudibras declares, that

“Love is a fire, that burns and sparkles,  
In men, as nat’rally as in charcoals.”

This couplet was fully exemplified in a recent case tried in the City Court of Brooklyn, before Judge NEILSON and a jury, in October 1871. It is known as the Homan-Earle Case.

The plaintiff was a maid of some thirty years, and the defendant a widower, something over fifty. The plaintiff, like Gough's parents, was poor but “very respectable,” and a regular attendant and member of the same church with the defendant. The minister of their church being one of the principal witnesses, the case before and during the trial became tea-table talk among the parishioners, at least, and among tonguesters generally. The testimony adduced on the one side and the other showed that the defendant began his attentions almost immediately after his wife's death, and continued them for a period of several months, when he was ascertained to be engaged in marriage to another person. The case was interesting, as there was no express promise, and it rested wholly upon circumstances—implied promises.

The learned judge in his charge says:—“The plaintiff herself upon the stand says, and she has said to others, and said continually, and without, as far as I can judge, any disposition to qualify that view of the case, ‘he never asked me in words to marry him, I never promised in words to do so.’”

Thus the question for the jury to consider was, whether the minds of the contracting parties met, and concurred in reference to the particular engagement.

The jury on this branch of the case were properly charged that, if “all the circumstances taken together, words, attentions, demonstrations, more or less earnest, assiduous and affectionate, amounted to a declaration of an intent to marry her, to the assurance that that was what he sought, was his conclusion, if he intentionally led her so to understand it, and she in response accepted that declaration, if there was a meeting of minds on

that as an engagement between them, the implied contract necessary to sustain the action has been proved." This was charged as a rule of law, and we hold properly so, on abundant authority: Vide *Button v. McCauley*, 5 Abb. Pr. N. S. 29, Court of Appeals, 1867.

On the question of damage, the judge charged that the jury were at liberty to consider "what the lady lost in being deprived of the benefit of the marriage, of the association, protection, easy life, and whatever was involved:" Vide *Kniffin v. McConnell*, 30 N. Y. Rep. 285. So also, "her disappointment, mortification, and pain (if any), sorrow, suffering, all being elements entering into this question of damage."

There have been so many adjudications in New York and other states, holding that long-bestowed and particular attentions having apparently an honorable object, furnish sufficient evidence from which the jury may imply a promise of marriage, that it would almost seem idle to consider it. On this point, vide *Southard v. Rexford*, 6 Cow. 254; *Wells v. Padgett*, 8 Barb. 323; *Hubbard v. Bonesteel*, 16 Barb. 360; *Willard v. Stone*, 7 Cow. 22; *Hutton v. Munsell*, 3 Salk. 16; *Hotchkins v. Hodge*, 38 Barb. 117; 1 Pars. on Cont. 545; *Button v. McCauley*, 5 Abb. Pr. N. S. 29. These authorities support the proposition that a promise to marry may be implied from circumstances, and thus uphold the charge on that point of Judge NEILSON in the Homan-Earle Case. And by the Statute of New York, promises to marry need not be in writing: 3 Rev. Stat. 5th ed. 221. It being a civil contract, no particular form of solemnization is necessary: *Van Tuyl v. Van Tuyl*, 8 Abb. Pr. 5; *Mercein v. Andrus*, 10 Wend. 461; 8 Barb. 323. This case was free from any doubtful or technical questions; the implied promise appeared to be proved, and the refusal to fulfil was shown in that the defendant had married another lady.

A very interesting case and one which involved many fine points of law, was that of *Frost v. Knight*, L. R. 5 Exch. 322, tried in the Court of Exchequer 1870, which was an action for breach of contract to marry upon the following facts: The defendant, as it was shown, promised to marry the plaintiff upon his father's death; before the death of the father the defendant refused to fulfil his promise or to be bound any longer thereby. At the trial the promise and breach were proved, as well as that

the father of the defendant was yet living. An elaborate brief was presented by the plaintiff which cited many cases in support of the proposition, that the declaration of the defendant that he would be bound no longer by his promise was such a breach of his promise as to entitle the plaintiff to treat the contract as broken, and to maintain her action for the breach of contract without waiting for the death of defendant's father: *Hochster v. De La Tour*, 2 E. & B. 678; *Avery v. Bowden*, 5 E. & B. 714; s. c. in error, 6 E. & B. 953; *Danube Railway Co. v. Xenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; *Phillpots v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Ex. 345; *Short v. Stone*, 8 Q. B. 358; *Lovelock v. Franklyn*, 8 Q. B. 371; *Crabtree v. Messer-smith*, 19 Iowa 182; *Lamoreaux v. Rolfe*, 36 N. H. 133; 2 Smith's Lead. Cas. (6th ed.) 17, 39; Leake on Cont. 462; Chitty on Cont. (8th ed.) 643. The defendant distinguished the cases relied on by the plaintiff, and cited among others *Bowdell v. Parsons*, 10 East 359; *Box v. Day*, 1 Wills. 59.

KELLY, C. B., in delivering the judgment of the court said: "The first question is whether this contract is really such that it is capable of being broken before the death of the father has taken place? Nothing can be more certain, as a matter of fact, than that a promise to marry upon an event which has not yet happened, is not broken by the defendant declaring that he will not perform his promise. If it can be called a breach at all, it is a promissory or prospective breach only, a possible breach which may never occur, and not an actual breach."

The learned judge then discusses the question and cites among others the case of *Hochster v. De La Tour*, 1 W. R. 469, which was a case where the defendant promised to employ the plaintiff as courier on and from June 1st, for three months, then next ensuing, and having, before the month of June arrived, given notice to the plaintiff that he would not perform his contract, the plaintiff brought his action. The judgment of the court, as delivered by Lord CAMPBELL, after first correctly stating the question, except that the statement assumes, or rather asserts, that the renunciation of the contract was a breach of it, proceeds to refer to the case of *Short v. Stone*, 8 Q. B. 358, treating it as a case of a promise to marry within a reasonable time after request; and then refers to the cases of *Ford v. Tiley*, 6 B. & C. 325, and *Bowdell v. Parsons*, 10 East 359, as authorities in favor of the plaintiff. *Short v. Stone*

was a case where the defendant promised to marry the plaintiff within a reasonable time after request, and the court held, that, upon a promise to marry the plaintiff, it was a breach to marry another woman. After briefly reviewing the cases of *Ford v. Tiley* and *Bowdell v. Parsons*, which were cases arising upon breaches of contract, the learned judge remarks: "These cases are no authority at all for the proposition that, a declaration by the defendant that, when the event shall have happened upon which he has promised to do an act, he will not perform his promise, amounts, in itself, to a present breach of the promise, upon which an action may be at once maintained."

Cases further commented upon by the court, were *The Danube Co. v. Xenos*, 11 C. B. N. S. 152; *Leigh v. Paterson*, 2 Moore 588; *Philpotts v. Evans*, 5 M. & W. 475; *Startup v. Cortazzi*, 2 C. M. & R. 165; *Ripley v. McClure*, 4 Exch. 345; which were actions arising out of contracts, and the court held in effect in those cases that a contract is not broken by defendant's previous declaration that he would not perform. In the last case cited PARKE, B., observes: "It was contended for the defendant that to constitute a breach of the contract a refusal at any time was insufficient; that it must be a refusal after the arrival of the cargo; and that the supposed refusal in July, long before the contract to buy became absolute, was no breach, and nothing more than an expression of an intention to break the contract, not final, and capable of being retracted; and we think that if the jury had been told that a refusal before the arrival of the cargo was a breach, it would have been inaccurate. We think that point rightly decided in *Philpotts v. Evans*."

"But when we consider the effect of this doctrines," observes KELLY, C. B., "if applied to a promise of marriage in relation to the question of damage, we find that it is to substitute for the contract which the parties have really entered into another contract which they have never entered into and never contemplated, the damages resulting from the breach of the one being totally different from those which may be sustained from the breach of the other;" and thus he gives the gist of his opinion: "It appears to me, therefore, quite obvious that it would be a self-evident untruth to say that the plaintiff has sustained damages from a breach of the defendant's contract to marry her at the death of a man who is now alive." He concludes, from the cases cited,

that the defendant, by renouncing the contract, has entitled the plaintiff to elect whether she will accept the renunciation, thus putting an end to the contract, and bring a special action on the case (in tort) for the wrong done by the act of renouncing, or, whether she will treat the renunciation as a nullity, and insisting upon the contract, await the death of the father, when, if the promise be not performed, she may bring her action for the breach, which will then and not until then have been really committed. Thus holding to a different rule in this case than in other actions where a certain thing is to be done upon the happening of a certain event, as in *Hochster v. De La Tour*. On the election of the plaintiff in this case the rule was made absolute to arrest the judgment, and judgment was thus given for the defendant. MARTIN, B., thought judgment should have been given for the plaintiff, leaving the defendant to bring error.

In the recent case of *Burtis v. Thompson*, 42 N. Y. 246, where the parties entered into an engagement to marry "in the fall," the defendant announced to the plaintiff in October, that he would not perform the contract. GROVER, J., held, that an action commenced immediately was not prematurely brought. An action for the breach of promise will lie at once, upon a positive refusal to perform a contract of marriage, although the time specified for the performance has not arrived. Thus concurring in the reasoning of the court in *Hochster v. De La Tour*.

We may say in passing that it is well settled, that a promise to marry cannot be specifically enforced. Unlike actions arising upon other contracts, the suit can only be for damages caused by the breach of the promise: *Cheney v. Arnold* (Court of Appeals), 15 N. Y. 345.

In the important case of *Blattmacher v. Saal*, 29 Barb. 22 (vide 7 Abb. Pr. 409), where the defendant was married at the time of the promise and deceived the plaintiff by representing that he was unmarried, it was held, that the agreement was not illegal on her part, and the defendant's disqualification to perform such promise was no defence; he should not be allowed to take advantage of his own wrong. An averment of marriage to another, dispenses with the request to marry, though the promise is so laid; and it is not necessary to aver that the other person is still living, as was obliged to be shown in the case of *Short v. Stone*, 8 Q. B. 358. Nor would it be necessary to allege in the

bill that the defendant knew his representations to be false: *Blattmacher v. Saal*, 29 Barb. 22.

It has sometimes been asked whether a man can maintain an action for such breach. Although it might be considered unmanly for a man to bring an action for breach of promise to marry, as such actions are uncommon, yet there have been actions of that kind brought, and the man would be entitled to such damage as he may be able to show himself to have sustained, as appears by the case of *Harrison v. Cage*, 1 Ld. Raym. 386. And loss of time and expense incurred in preparation for the marriage would be the grounds of damage directly incidental to the breach: *Smith v. Sherman*, 4 Cush. 408. But evidence of impaired health would be inadmissible, unless that be alleged in the plaint as special damage resulting from the breach, as shown in the case of *Bedell v. Powell*, 13 Barb. 183.

In the peculiar case of *Conrad v. Williams*, 6 Hill 444, where it was shown to have been a promise to marry the plaintiff if he ever married, it was held to be a void promise, as being in restraint of marriage. On the other hand a promise of marriage made after seduction has been effected, and in consequence thereof, is not thereby rendered invalid. It is not liable to the objection that it encourages immorality either, because the wrong has been already perpetrated, as shown in the case of *Hotchkins v. Hodge*, 38 Barb. 117; 2 Am. Law Reg. N. S. 440. If seduction be accomplished by means of promise of marriage on the part of the seducer, a consent of the female to marry him, amounting to a mutual promise on her part to marry, may be implied: *People v. Kenyon*, 5 Park. Cr. 254; *Southard v. Rexford*, 6 Cow. 254. Compare *Liefman v. Solomon*, 7 Abb. Pr. 409, n. In cases where seduction is shown, it is always held, that that circumstance should be regarded as an aggravation of the breach of promise to marry, authorizing the jury to give an increased verdict: *Wells v. Padgett*, 8 Barb. 323.

And in all such actions any misconduct showing that the plaintiff would be an unfit companion in married life, may be given in evidence in mitigation of damages: *Button v. McCauley*, 5 Abb. Pr. N. S. 29; *Palmer v. Andrews*, 7 Wend. 142; 2 Am. Law Reg. N. S. 120-440. But it is not competent for the defendant to prove, even in mitigation of damages, that on one or more particular occasions the plaintiff drank intoxicating liquors to

excess, *Button v. McCauley, supra*, for *non constat* the defendant may have been a party to the same misconduct.

Thus it may be concluded from the several authorities cited: 1. That an *express* promise to marry need not be shown to sustain an action for a breach: but that the promise may be *implied* from circumstances in the case: 2. That marriage is a civil contract and governed by similar rules of construction with others: 3. That the damages in such actions may be based upon loss of the association, protection, easy life, or whatever might be involved; and 4. That it may be given in mitigation of damages that the plaintiff would be an unfit companion and the like.

J. F. B.

---

RECENT AMERICAN DECISIONS.

*Supreme Court of Vermont.*

THOMAS S. AND CHARLES P. GILSON v. L. BINGHAM.

In case of warranty or fraud in the sale of chattels, the property may be retained by the vendee and the sale affirmed, yet his right to sue upon the warranty, or for the deceit, will not thereby be affected.

If the vendee of an article manufactured for him under a special executory contract, there being no warranty or fraud, accept it, though defective, he becomes thereby bound to pay the contract price; but if he reject it and give notice of the non-acceptance, he can bring his action for the non-performance of the contract; but he cannot accept it and bring such action; nor can he accept it and impose conditions and sue the vendor for non-compliance with the conditions imposed.

A judgment recovered by the vendor for the balance of the price due for an article manufactured to order under a special contract, is a bar to a suit brought by the vendee for a breach of the contract.

A voluntary payment cannot be recovered back.

ASSUMPSIT upon an agreement by defendant to make and deliver a hearse to plaintiffs. Plea, the general issue with notice.

The plaintiffs' evidence tended to show that in April 1865, they contracted with the defendant to make, at St. Albans, and send a hearse to the plaintiffs at Rutland, of a specified style of make and quality of material and finish, for two hundred and ten dollars. That defendant made and sent a hearse to plaintiffs which was not according to the contract. That several letters passed between the parties after the hearse was received by the plaintiffs, and, among the rest, one dated July 26th 1865, and another dated August 8th 1865, sent by the plaintiffs and received